In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1048

GEORGE J. COTTAGE, PETITIONER

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted on all counts of a three-count indictment charging him with larceny, receiving stolen property and conspiracy to commit larceny, in violation of 18 U.S.C. 659 and 371. Each count related to the theft of a Roadway Express Company tractor-trailer containing 880 cases of whiskey on November 30, 1961 (see R. 9a-14a, 39a-66a).[1] Petitioner was

[1] The record of trial, filed with the clerk of this Court, includes one volume containing excerpts from the transcript

sentenced to imprisonment for concurrent three-year terms on each count, and the court of appeals affirmed *per curiam* (Pet. 9-10; 354 F. 2d 975).

Relying on *Milanovich* v. *United States*, 365 U.S. 551, petitioner contends that he could not be lawfully convicted of both larceny and receiving stolen property with regard to the same transaction and that therefore his commitment under counts one and two was improper. As the court below pointed out, however, this case, unlike *Milanovich*, includes a valid conviction on an additional charge.[2] Petitioner does not contend that the evidence was insufficient to support his conviction of conspiracy to commit larceny.[3]

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of trial and a separate volume containing the charge to the jury.

[2] This case also differs from *Milanovich* in that here identical sentences were imposed for both the larceny and the receiving-stolen-property convictions.

[3] The evidence showed that, about two hours before the theft, petitioner told co-conspirator Harowski that he might unload cargo from a Roadway Express Company truck later that night into a garage leased by Harowski (R. 68a-69a, 80a). The garage owner testified that, some time prior to the theft, petitioner had displayed an interest in buying the garage and had inspected the inside (R. 91a-95a). Shortly after the theft, officers observed the stolen trailer being unloaded at Harowski's garage (R. 38a-40a, 75a, 123a) where, later that night, the stolen whiskey was found. After the trailer had been unloaded, the officers observed co-defendant Francisco attempting to attach a tractor to it (R. 16a, 27a, 38a). When questioned as to the trailer's cargo, Francisco acted suspiciously (R. 17a-18a, 29a-30a). A clerk at the hotel where Francisco had registered the day before the theft, supposedly for a one-week tenancy, testified that petitioner met Francisco at the hotel and that, on the afternoon of the theft, petitioner told her that he and Francisco were going to a

Instead, he apparently relies (see Pet. 6) on the rule that, "when by definition the intended substantive offense requires a plurality of actors, a conspiracy prosecution cannot be maintained if only the minimum number of parties logically necessary for the commission of the substantive offense agree to commit it." See *Developments in the Law—Criminal Conspiracy*, 72 Harv. L. Rev. 920, 954 (1959). But that doctrine is inapplicable here, since larceny is plainly not an offense which, by definition, requires a plurality of actors.

Because petitioner's conviction on count three of the indictment is clearly valid, and since he received equal concurrent sentences on all three counts, there is no occasion to review the convictions on counts one and two. *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Sinclair* v. *United States*, 279 U.S. 263, 299; *United States* v. *Sheridan*, 329 U.S. 379, 381; *United States* v. *Berger*, 338 F.2d 485 (C.A. 2), certiorari denied, 380 U.S. 923; *United States* v. *Bentvena*, 319 F.2d 916, 954 (C.A. 2), certiorari denied, 375 U.S. 940; *United States* v. *Conte*, 349 F.2d 304 (C.A. 6), certiorari denied, 382 U.S. 926; *United States* v. *Tenenbaum*, 327 F.2d 210 (C.A. 7), certiorari denied, 377 U.S. 905; *Carter* v. *United States*, 332 F.2d 728 (C.A. 8), certiorari denied, 379 U.S. 841; *Arellanes* v. *United States*, 302 F.2d 603 (C.A. 9), certiorari denied, 371 U.S. 930; *Fabianich* v. *United*

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trucking company and would be gone for a while (R. 102a-107a). The clerk further stated that Francisco's bed was not slept in on the evening of the theft and that, after he left the hotel that afternoon, he did not return or pay his bill (*ibid.*).

States, 302 F.2d 904 (C.A.D.C.), certiorari denied, 371 U.S. 816.

It is respectfully submitted, therefore, that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.

FRED M. VINSON, JR.,
Assistant Attorney General.

BEATRICE ROSENBERG,
MERVYN HAMBURG,
Attorneys.

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